

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST L. GREEN,

Defendant-Appellant.

UNPUBLISHED

October 16, 2003

No. 241571

Wayne Circuit Court

LC No. 01-012200

Before: Kelly, P.J. and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a); assault with intent to commit murder (AWIM), MCL 750.83; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction, twenty-five to fifty years' imprisonment for the AWIM conviction, forty to sixty months' imprisonment for the felon in possession conviction, and the mandatory two-year consecutive term for the felony-firearm conviction. We affirm.

I. Facts

On August 1, 2000, Deshown Holmes, accompanied by his friend Robert Williams, drove to his neighborhood where he lived with his mother and other relatives. He observed a group of men "horsing around" on his mother's lawn and told them to stop. An argument ensued between Holmes and one of the men, co-defendant William Agee¹, defendant's cousin. As the argument escalated, defendant produced a gun and several shots were fired. While trying to flee, Holmes was shot and beaten by defendant and co-defendant. Holmes later died of his injuries. Williams was shot once in his leg as his back was turned and, when running from the scene, was also shot in the hip.

¹ Defendant was tried jointly with William F. Agee. This case was submitted with *People v Agee*, Docket No. 241429.

Defendant was charged with first-degree premeditated murder for the death of Holmes. For the shooting of Williams, he was charged with AWIM on a theory of transferred intent, as well as felon in possession of a firearm, and possession of a firearm during the commission of a felony. The jury found him guilty as charged.

II. Sufficiency of the Evidence – Intent to Kill

In his Standard 11 brief, defendant argues that the prosecution presented insufficient evidence to prove he intended to kill Holmes. In his brief on appeal, he also argues he did not have the requisite intent to kill Williams on the AWIM charge. We disagree.

This Court reviews the evidence, in a light most favorable to the prosecution, to determine whether there was sufficient evidence to show that the essential elements of the crime were proved to a rational trier of fact beyond a reasonable doubt. *People v Breck*, 230 Mich App 450, 456; 584 NW2d 602 (1998). The trier of fact determines what inferences are drawn from the evidence and what weight to accord to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

A. First Degree Murder

To prove first-degree premeditated murder, a prosecutor must establish that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate; premeditation and deliberation require sufficient time to allow the defendant to take a second look, and premeditation and deliberation may be inferred from the circumstances. *People v Graves*, 224 Mich App 676; 569 NW2d 911 (1997), mod 458 Mich 476; 581 NW2d 299 (1998), lv den after rem 461 Mich 883; 603 NW2d 779 (1999). Intent to kill may be inferred from the use of a dangerous weapon. *People v DeLisle*, 202 Mich App 658, 672; 509 NW2d 885 (1993), lv den 447 Mich 987 (1994), cert den sub non *DeLisle v Rivers*, 526 US 1075; 119 S Ct 1476; 143 L Ed 2d 559 (1999). “The intent with which a person does an act is known by the way in which he expresses it to others or indicates it by his conduct. The intent with which a person does an act can sometimes be determined from the manner in which it is done, the method used [and] all other facts and circumstances, but only if that intent is established by the evidence.” *People v Guy Taylor*, 422 Mich at 562; 375 NW2d 1 (1985). To find a specific intent to kill, a jury is not limited to direct, positive, or independent evidence. *Id.* at 567.

[T]he jury “may draw the inference, as they draw all other inferences, from any facts in evidence which to their minds fairly prove its existence.” And in considering the question they may, and should take into consideration the nature of the defendant’s acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made. [*Id.* at 568, quoting *Roberts v People*, 19 Mich 401, 415-416 (1870).]

After review of the record, we find the prosecution presented sufficient evidence to prove to a rational trier of fact that defendant possessed the requisite intent to kill Holmes beyond a reasonable doubt. Here, defendant ignored Holmes' sister's plea not to shoot her brother and fired twice. Defendant then chased Holmes and fired a third time. Once defendant caught up with him, defendant yelled, "who's a b---- now?" As Holmes pleaded with defendant, defendant held the gun to his head and said, "I'll kill you, M-F." When Holmes attempted to reason with defendant, defendant struck him in the head with the hand holding the gun. Defendant continued to beat him in the head, face, and legs, which ultimately resulted in Holmes' death. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to prove defendant's intent to kill Holmes.

B. AWIM

Assault with intent to commit murder consists of three elements: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). For the second element, it was the prosecutor's theory that because defendant had the premeditated intent to kill Holmes, this intent to kill was transferred to the second victim, Williams.

The doctrine of transferred intent doctrine is explained in *People v. Lovett*, 90 Mich.App 169, 171; 283 NW2d 357 (1979):

"In the unintended-victim (or bad-aim) situation-where A aims at B but misses, hitting C-it is the view of the criminal law that A is just as guilty as if his aim had been accurate. Thus where A aims at B with a murderous intent to kill, but because of a bad aim he hits and kills C, A is uniformly held guilty of the murder of C. And if A aims at B with a first-degree-murder state of mind, he commits first degree murder as to C, by the majority view. So too, where A aims at B with intent to injure B but, missing B, hits and injures C, A is guilty of battery of C." [Citation omitted.]

Under *Lovett*, the Court determined that if two individuals are assaulted from a single act then the defendant may be charged with two separate offenses. *Id.* at 174. This principle was reaffirmed in *People v. Lawton*, 196 Mich App 341; 492 NW2d 810 (1992). In *Lawton*, which included three counts of assault with the intent to commit murder, the defendant was attempting to shoot a man and in the process struck the man's daughter, who was hiding in a closet with her mother. *Id.* at 344-345. The Court in *Lawton* determined that the defendant's intent to kill could be transferred to the daughter and mother, despite his ignorance of their presence. *Id.* at 351. According to *Lawton*, defendant's lack of awareness did not make his crime any "less heinous." *Id.*

Defendant asserts that he had no animus toward Williams, who was shot in the leg when his back was turned when the altercation first began and later, as he was fleeing the altercation, was shot again in the hip. However, applying the doctrine of transferred intent, where defendant aimed at Holmes and struck Williams, defendant's intent to kill Holmes was transferred to his actually having intended to kill Williams, the second victim. *Lawton, supra*, at 350-351. Because the jury properly found that defendant intended to kill Holmes, we find defendant's argument on transferred intent to be without merit.

III. Admission of Medical Records

Defendant next argues the trial court abused its discretion by excluding defendant's medical records when the records would have impacted the witnesses' credibility. We disagree.

The admission of evidence is reviewed for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). An abuse of discretion is found when an unprejudiced person considering the facts on which the trial court acted would find no reason or justification for the ruling made. *Id.*

All relevant evidence is generally admissible at trial. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Relevant evidence is evidence having any tendency to make the existence of a fact that is of consequence to the case at hand, more probable or less probable than it would be without the evidence. *Id.*; MRE 401. Although the medical records would have shown that defendant suffered a leg injury, they would not have had any tendency to make a "fact of consequence" more or less probable. Although defendant argues that the records would have shown that he could not have chased the victim as the witnesses testified, the medical records would have only shown that defendant suffered a leg injury months before the incident, not that he could not have chased the victim. Even if the records did have some tendency to show that defendant could not have chased the victim, the evidence was properly excluded because it was cumulative, MRE 403; several witnesses had already testified about defendant's leg injury. Therefore, the trial court did not abuse its discretion in excluding defendant's medical records.

IV. Testimony That Defendant Carried a Gun

Defendant next argues that the trial court erred in admitting defendant's uncle's testimony that defendant always carried a gun with him when he left the house. We disagree.

Defendant objected during trial arguing that the testimony was more prejudicial than probative. He argues on appeal that the testimony should have been excluded under MRE 404(b). Therefore, this issue is unpreserved in part. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). To the extent that the issue is unpreserved, it is forfeited unless defendant shows plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Under either argument, we find that the trial court did not err in admitting the evidence. The testimony was offered for the proper purpose of showing that defendant habitually carried the type of gun used in the crimes, a material issue in the case. In light of the testimony of several witnesses who saw defendant shoot the victim, the probative value of the evidence was not "substantially outweighed by its potential for unfair prejudice." Therefore, the evidence was not inadmissible under either MRE 401 or MRE 404(b). *People v Starr*, 457 Mich 490, 496; 577 NW2d (1998); *Aldrich, supra* at 114.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Mark J. Cavanagh

/s/ Michael J. Talbot